No. 80-581

In The

Supreme Court of the United States

October Term, 1980

COMMONWEALTH EDISON COMPANY, CENTRAL ILLINOIS LIGHT COMPANY, DAIRYLAND POWER COOPERATIVE, DETROIT EDISON COMPANY, INTERSTATE POWER COMPANY, LAKE SUPERIOR DISTRICT POWER COMPANY, LOWER COLORADO RIVER AUTHORITY/CITY OF AUSTIN, MINNESOTA POWER & LIGHT COMPANY, NORTHERN STATES POWER COMPANY, UPPER PENINSULA GENERATING COMPANY, WISCONSIN POWER & LIGHT COMPANY, DECKER COAL COMPANY, PEABODY COAL COMPANY, WESTMORELAND RESOURCES, INC. and WESTERN ENERGY COMPANY,

Appellants,

— against —

STATE OF MONTANA, TED SCHWINDEN, GOVERNOR OF MONTANA, HELEN J. FEAVER, DIRECTOR OF THE STATE DEPARTMENT OF REVENUE, and MAURICE L. BRUSETT, DIRECTOR OF ADMINISTRATION AND STATE TREASURER,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICI CURIAE OF THE STATES OF NORTH DAKOTA AND WEST VIRGINIA IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

North Dakota, like its neighboring state of Montana, is the respository of vast deposits of a precious natural resource: coal. As the nation's energy crisis has grown more and more acute and the demand for alternatives to expensive foreign oil increasingly insistent, America has looked to the coal-producing states of the West and the Northern Great Plains to help alleviate a serious national problem.

North Dakota has responded to the crisis, with coal production in the state more than doubling between 1973 and 1980—from 6.8 million to 16.2 million tons of coal. The great bulk of coal mined in North Dakota, as in Montana, is used to satisfy the demands of energy consumers in distant states. When all electric generating plant projects now approved are in operation, about 80 percent of the electricity generated from coal produced in North Dakota will be exported out of state.

But such a dramatic increase in coal development does not take place without a profound impact on the land and the people on it. First, there are the ordinary costs associated with any kind of accelerated, large-scale industrial development. The sudden influx of workers and their families means that communities in coal impact areas face new and expensive demands for increased fire and police protection, additional classroom space and expanded teaching staffs, new streets and highways, improved water and sewage systems, parks and recreation areas, and a whole host of social services.

Secondly, there are the environmental risks entailed in such development. The burning of coal by electric generating plants in North Dakota results in the release of tons of sulfur dioxide into the air despite state and national air quality standards. Such plants also require a tremendous volume of water, a resource even more precious than coal in Western and Midwestern States. Water is essential to the farming and ranching activities which constitute the economic and social underpinning of both North Dakota and Montana.

Finally, coal development results in the loss of a nonrenewable resource. Unlike the crops of wheat and sun-

flowers which stretch across the North Dakota landscape every year, coal is a "one-time harvest." Once mined and burned, it can never again serve as an economic or energy resource for the people of North Dakota. This fact imposes a special responsibility on those who oversee the development of this resource and plan for future generations of North Dakotans.

With these and other considerations taken into account, North Dakota has imposed a severance tax on coal which is currently set at 96 cents per ton.[1] Fully 70 percent of the revenues generated by this tax are distributed among cities, counties, and school districts impacted by coal development. Although its rate of severance tax is lower than that of Montana, North Dakota has a vital interest in preserving the right of states to levy whatever taxes they deem necessary and proper on their own natural resources. If appellants are successful, no state will be immune to special interest challenges to its sovereign right to collect such taxes.

The State of West Virginia joins North Dakota as *amicus curiae* because it also is a significant producer of coal. In 1980, coal production in West Virginia totaled more than 110 million tons. West Virginia imposes severance taxes on coal which total 3.85 percent of gross sales.[2]

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1 Section 57-61-01, North Dakota Century Code, as amended. The coal severance tax in North Dakota is revised twice annually to reflect any increase in the wholesale price index as prepared by the U. S. Department of Labor.

2 Sections 11-13-2a, 11-13-2l of the West Virginia Code of 1931, as amended.

Thus West Virginia has a substantial interest in safeguarding the right of states to determine the nature and amount of taxes imposed on the development of natural resources within their borders.

SUMMARY OF ARGUMENT

No power is more precious or necessary to a state than its power to tax. Appellants seek to limit Montana's authority to levy a coal severance tax on the basis of its alleged conflict with a vague and ill-defined national policy favoring the use of coal. They fail to cite any specific Congressional enactment which purports to restrict state taxing powers in this area, nor even any general directive to that effect. Absent a clearly discernible federal policy limiting state severance taxes, the Montana coal severance tax is not invalid under the Supremacy Clause of the Constitution.[3]

ARGUMENT

The power of taxation is the most fundamental prerogative exercised by the states in our federal system. It is a power which cannot be abrogated except by specific

3 This *amici curiae* brief deals only with arguments raised under the Supremacy Clause. *Amici* rely upon the briefs filed by appellees and the State of Wyoming for treatment of the Commerce Clause issue.

mandate of the Constitution or by a particular act of Congress. This principle has gained repeated endorsement in the decisions of this Court. Thus, in *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 93 (1940), the Court stated:

> "In the states there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the states over taxation is plenary."

Similar strong language in support of a state's broad authority to tax is found in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959):

> "When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests."

It is important to keep this traditional judicial deference to state taxing power in mind when considering the cases principally relied on by appellants in their argument that the Montana coal severance tax must fall by virtue of the Supremacy Clause. None of those cases involved preemption of a state tax statute.

In fact, in the seminal case of *Hines v. Davidowitz*, 312 U.S. 52 (1941), which provides the basis for the third test of preemption so frequently cited by appellants—a state statute will be found unconstitutional if it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress—this Court emphasized the special status of state tax laws. In striking down a Pennsylvania statute which provided for more intrusive

regulation of aliens than required by federal law, the Court noted that the state legislation was in a field affecting international relations, traditionally reserved to the national government. It then took pains to distinguish that situation from one involving state taxing power (page 68):

> "Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans."

An equally important aspect of *Hines* and the other cases offered by appellants is the fact that all involved preemption of a state statute because of conflict between it and very specific federal enactments occupying the same field. Thus, in *Hines,* an Alien Registration Act adopted by Pennsylvania which required aliens to carry identification cards was in clear conflict with the federal Alien Registration Act of 1940, which had no such requirement.

Similarly, in *Perez v. Campbell,* 402 U.S. 637, at 644 and 648 (1971), Arizona's Motor Vehicle Safety Responsibility Act, protecting judgment creditors from "financially irresponsible persons," clashed directly with provisions of the federal Bankruptcy Act, intended to give discharged debtors a new start "unhampered by the pressure and discouragement of preexisting debt."

In *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977), California's laws governing the weight of packages and containers were superseded by detailed provisions of the Federal Meat Inspection Act, the Federal Food, Drug and

Cosmetic Act, and the Fair Packaging and Labeling Act. In *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978), legislation in the state of Washington relating to the size of tankers and the necessity of having pilots on board coastwise vessels was in direct conflict with the federal Ports and Waterways Safety Act of 1972.

Finally, in both *Hill v. Florida,* 325 U.S. 538 (1945), and *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), this Court found that Florida had made an unwarranted excursion into the field of labor relations and was thus at odds with the comprehensive National Labor Relations Act.

In contrast to the cases described above, there is no evidence in the instant case of a specific federal statute with which the Montana coal severance tax is in direct conflict. Instead, appellants refer to actions by Congress which appear to establish a national policy in favor of increased production and use of coal. (Appellants, and the State of Texas in its brief *amicus curiae,* also point to a series of Presidential energy messages in the same vein; however, since Presidential messages do not rise to the level of Congressional enactments, they are irrelevant to a discussion of the Supremacy Clause).

However, appellants do not refer to any part of this general policy which dictates that coal must be cheap, or that Montana is the only acceptable source of coal, or that states which happen to have abundant coal supplies must disregard the social and environmental costs and the financial impact of increased coal production. Nor do they make any showing that Congress has concerned itself with the effect of coal severance taxes on coal production.

In short, appellants would have this Court rule that a broad national policy only vaguely defined by Congress should serve to perempt specific state legislation to which Congress has never addressed itself. Such an interpretation of the Supremacy Clause would be a dramatic departure from the Court's prior rulings in this area. Simply stated, "[t]his Court is generally reluctant to infer preemption . . ." *Exxon Corp. v. Governor of Maryland,* 437 U. S. 117 (1978). As the Court said in *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 143 (1963):

> "[F]ederal regulation . . . should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

Appellants are unable to cite any federal legislation in which Congress has "unmistakably . . .ordained" that Montana's 30 percent coal severance tax must be reduced or declared invalid.

This case has very broad implications for the future of state taxing power. If appellants succeed in nullifying the Montana coal severance tax, a host of other state severance taxes will be called into question. Texas, whose severance tax revenues are almost twenty times those of Montana, could well be the target of a similar challenge based on the impact of its taxes on oil and gas prices. Nor would severance taxes be the only category of taxes affected. Almost any localized tax with an impact beyond state borders could be in jeopardy if it was found to conflict with "national policy."

In addition, a favorable ruling for appellants would soon lead to the entanglement of state and federal courts across the country in a process for which they are ill-suited

and ill-prepared: the setting of appropriate state taxing rates. It would be grossly inappropriate for courts to substitute their judgment for the duly considered actions of state legislatures. As this Court observed in *State of Wisconsin v. J. C. Penney*, 311 U. S. 435, 445 (1940):

> "At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves into the delicate processes of fiscal policy-making."

If Congress sees fit to restrict the power of the states to levy taxes on coal or any other natural resource, Congress will do so in explicit terms. As appellees have pointed out, the 96th Congress considered but did not approve legislation imposing a ceiling of 12½ percent on coal severance taxes. Such legislation has already been introduced in the current session of Congress. It is not the function of this Court to anticipate the will of Congress.

CONCLUSION

For the reasons set forth above and in the briefs submitted by appellees and other *amici curiae* in their behalf, the appeal should be dismissed, or, in the alternative, the judgment entered by the Supreme Court of the State of Montana should be affirmed.

Respectfully submitted,

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